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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the United States Claims Court has exclusive jurisdiction over a civil action against the United States that includes both a Tucker Act claim for more than $10,000 in money damages and a claim for declaratory or injunctive relief involving the same issues as the Tucker Act claim, or whether such an action can be split into two lawsuits, with the district court and the regional court of appeals having jurisdiction over the claim for prospective relief, and the Claims Court having jurisdiction over the claim for retrospective relief.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, certain other officials of the Department of Health and Human Services were named as defendants in the district court and are petitioners here: William L. Roper, M.D., Administrator of the Health Care Financing Administration; and Norval D. Settle, Judith A. Ballard, and Donald F. Garrett, members of the Departmental Grant Appeals Board.

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v.

COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-16a) is reported at 816 F.2d 796. One opinion of the district court (App. 17a-31a) is reported at 616 F. Supp. 687. The other opinion of the district court (App. 33a-35a) is reported at 622 F. Supp. 266. The orders of the district court respecting jurisdiction (App. 37a-38a) are unreported. Decisions No. 638 and No. 438 of the Departmental Grant Appeals Board of the Department of Health and Human Services (App. 39a-52a and 53a-84a) are unreported.

JURISDICTION

The judgments of the court of appeals (App. 85a, 86a) were entered on March 31, 1987. A petition for rehearing was denied on June 2, 1987 (App. 87a-88a). On August 19, 1987, Justice Brennan extended the time for filing a

petition for a writ of certiorari to and including September 30, 1987. On September 22, 1987, Justice Brennan further extended the time for filing a petition for a writ of certiorari to and including October 30, 1987.

STATUTES INVOLVED

5 U.S.C. (Supp. IV) 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. 704 provides in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. * * *.

28 U.S.C. 1346(a) provides in pertinent part:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> * * * * *
>
> (2) Any * * * civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort * * *.

28 U.S.C. 1491(a) provides in pertinent part:

> (1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *.
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. * * *.

STATEMENT

This action arises out of a dispute between petitioner and respondent over whether certain expenditures incurred by respondent in providing services at intermediate

care facilities for the mentally retarded were properly reimbursable under the Medicaid program. Respondent filed suit in the United States District Court for the District of Massachusetts, asking that court to "[e]njoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth" for the disputed funds (App. 93a, 98a). The court of appeals found that this action presented both a "retrospective" claim for money damages against the United States, and a "prospective" claim for declaratory and injunctive relief. The court concluded that under the Tucker Act, 28 U.S.C. 1491, the United States Claims Court had exclusive jurisdiction over the retrospective part of the suit. However, insofar as the complaint sought prospective relief, the court held that the district court also properly had jurisdiction. Accordingly, the court reached the merits of the legal dispute between the parties, which it resolved in favor of respondent.

1. During the period 1978-1982, respondent received several hundred million dollars from the federal government in partial reimbursement for its costs in providing services at intermediate care facilities for the mentally retarded (ICFs/MR). ICFs/MR are generally eligible for reimbursement under Section 1905(a)(15) and (d) of the Medicaid statute, 42 U.S.C. (& Supp. III) 1396d(a)(15) and (d).[1]

The statute, however, limits reimbursable services at ICFs/MR in several important ways. For example, Medicaid covers only "medical assistance" and "rehabilitation and other services to help [the ultimate beneficiaries] attain or retain capability for independence or self-care" (42 U.S.C. (Supp. III) 1396; see also 42 U.S.C. 1396d(d)(1)). In addition, under 42 U.S.C. 1396a(a)(25) Medicaid is a "payor of last resort," that is, Medicaid will

[1] The Medicaid statute is Title XIX of the Social Security Act, 42 U.S.C. (& Supp. III) 1396-1396q. See *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524, 528-529 (1984).

not reimburse states for expenditures where a third party has an obligation to pay for the services in question.[2] Similarly, under 42 U.S.C. 1396a(a)(17)(B), the agency administering the state Medicaid plan is required to "tak[e] into account" such resources as are otherwise "available" to Medicaid applicants or recipients. See also 42 U.S.C. 1396a(a)(11).

To implement the statute's limitations on funding of ICFs/MR, the Secretary has adopted a regulation providing that payments to ICFs/MR "may not include reimbursement for vocational training and educational activities" (42 C.F.R. 441.13(b)). In implementing the regulation, the Secretary has taken the position that both "traditional" education and "special education" are excluded from Medicaid funding and, in determining whether a service constitutes "education," has looked particularly at whether it is provided by the state's educational authorities as opposed to public health care entities. This position stems both from the fact that "educational services" are distinguishable from medical assistance and rehabilitation, and from the fact that state educational authorities often are legally and financially obligated to provide certain services, under the auspices of "educational" programs, to all handicapped children (including those in ICFs/MR) irrespective of the availability of Medicaid coverage. See generally *Board of Education* v. *Rowley*, 458 U.S. 176, 179, 181 (1982). In the Secretary's view, therefore, a non-Medicaid program legally committed to provide such services without charge to the re-

[2] "Medicaid is intended to be the payer of last resort. Other available sources, including the legal liability of other third parties to pay, must be used before Medicaid begins payment." House Comm. on Ways and Means, 100th Cong., 1st Sess., *WMCP 100-4, Background Material and Data on Programs Within the Jurisdiction of the Comm. on Ways and Means* 302 (Comm. Print 1987).

cipient is deemed a "payor of first resort" whose independent obligation to afford the services negates any obligation of Medicaid to pay for them.

On two separate audits, which covered the years 1978-1982, auditors from the U.S. Department of Health and Human Services (HHS) determined that Massachusetts had included among the costs for which it had obtained Medicaid reimbursement various "special education" services provided to residents at ICFs/MR by the Massachusetts Department of Education (MDOE). All of the services in question were required by state law to be provided by the MDOE, which, moreover, was directed by law to "assume the costs of all aspects of the educational program" (Mass. Ann. Laws ch. 71B, § 12 (Law. Co-op. 1978 & Supp. 1987)). Because the auditors viewed the services in question as unreimbursable under the Medicaid statute and regulations, HHS disallowed $6,414,964 in federal financial participation for the period from July 1, 1978, to December 31, 1980, and $4,908,994 for the period January 1, 1981, through June 30, 1982 (see App. 17a, 34a).[3] Respondent appealed to the Departmental Grant Appeals Board (GAB) of HHS, which upheld both disallowances (*id.* at 39a-52a, 53a-84a). The disallowed amounts have since been recouped by petitioner by withholding a portion of certain advance reimbursements given to respondent for Medicaid expenses in years subsequent to the audit years.

2. In response to the GAB decisions, respondent filed two complaints in federal district court. Each complaint sought "judicial review of a final decision of the [GAB], which sustained the * * * disallowance of [a specified

[3] The amounts listed in text are the amounts that remain at issue in this case. Certain other, relatively minor disallowances resulting from the audits are no longer at issue. The disallowances amounted to roughly four percent of respondent's total costs claimed for ICFs/MR in the relevant periods.

monetary amount] in federal financial participation due to the Commonwealth of Massachusetts" (App. 89a-90a, 95a-96a). Under the heading "Requests for Relief," each complaint prayed that the court "[e]njoin the [defendants] from failing or refusing to reimburse the Commonwealth, or from recovering from the Commonwealth, the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded during the period in question" (*id.* at 93a).

On January 11, 1984, the district court held (in a handwritten order) that it had jurisdiction (App. 38a). On August 27, 1985, the court issued an opinion granting summary judgment to respondent and overturning the GAB's first disallowance determination in its entirety (*id.* at 17a-31a). The court entered judgment on October 7, 1985, in which it "ordered and adjudged that the decision of the [GAB] which disallowed reimbursement to the Commonwealth of Massachusetts the sum of $6,414,964 in federal financial participation under the Medicaid program, 42 U.S.C. §§ 1396 *et seq.*, is reversed" (*id.* at 32a). Because respondent's second complaint raised the same legal issues as the first complaint, the district court likewise entered a memorandum and order and corresponding judgment holding for respondent on that complaint on November 25, 1985, and December 2, 1985 (*id.* at 33a-36a).

3. Petitioners appealed to the Court of Appeals for the First Circuit and argued, inter alia, that the district court had impermissibly entered a money judgment that only the United States Claims Court, under the Tucker Act, had the power to render. The court of appeals agreed with petitioners that respondent's lawsuits sought money judgments against the United States and that, to this extent, they had been improperly brought in district court. In so holding, the court of appeals reiterated, in abbreviated form, the reasoning of its decision one day earlier in *Massachusetts* v. *Departmental Grant Appeals Bd.*,

815 F.2d 778 (1st Cir. 1987). The court recognized that no suit against the United States for any form of relief may be maintained in the absence of a waiver of sovereign immunity. The court further acknowledged that the Administrative Procedure Act, 5 U.S.C. (Supp. IV) 702, permits only "action[s] * * * seeking relief other than money damages." Thus, the court held: "The district court may not * * * consider the claim for money past due. That claim is one for 'money damages' * * *." App. 5a. Insofar as a plaintiff sought to recover past-due money from the federal government, the court of appeals concluded, its sole remedy lay in the Claims Court under the Tucker Act, 28 U.S.C. 1491 (App. 5a).

Nevertheless, the court went on to hold that this did not mean the entire action had to be litigated in the Claims Court. The court reasoned that as long as "a grant-in-aid dispute concerns a legal question that has a significant, prospective effect on the ongoing relationship between the federal agency and the affected state"—in other words, as long as a dispute will affect the amount of money the state receives in the future as well as the amount of money (if any) past due—"the Administrative Procedure Act grants the district court jurisdiction to provide injunctive and declaratory relief" (App. 5a). Indeed, the court thought that such an action should proceed in district court in all but "the unusual situation in which the disallowance decision had no significant prospective effect [and] the challenge *only* concerned the money allegedly past due" (*id.* at 4a).[4] The court accordingly held that the district

[4] *Departmental Grant Appeals Board* had been such a challenge, because it concerned only services rendered in the past pursuant to a court order that was no longer in effect. Judge Coffin regarded that case as "a rare if not a unique one" (815 F.2d at 789 (concurring opinion)), foreshadowing the suggestion of the court in the present case that it would be highly unusual for a case *not* to be bifurcated into a Tucker Act challenge to disallowance of money allegedly past due and a "prospective" case that could proceed in district court.

court had properly reached the merits, except insofar as specific services rendered in the past were concerned (see *id.* at 7a & n.2). Significantly, the court added (*id.* at 6a):

> Should the Secretary persist in withholding reimbursement for reasons inconsistent with our decision, the Commonwealth's remedy would be a suit for money past due under the Tucker Act in the Claims Court. In that subsequent suit we assume that the Secretary would be collaterally estopped from raising issues decided here.

On the merits, the court held that petitioners, in determining that all services provided by the MDOE were nonreimbursable under Medicaid, had misconstrued the statute. Finding that "medical" and "educational" services are not necessarily mutually exclusive, the court took the view that "the Secretary [must] develop a Medicaid audit procedure that looks behind the state statutory label 'special education' to determine whether services are reimbursable" as "medical assistance" or "rehabilitation" services (App. 16a). The court also rejected petitioners' contention that the MDOE's independent statutory obligation to "assume the costs" of the services in question meant that Medicaid, as payor of last resort, was not liable for those services. Without citation of authority, the court opined that state agencies should not be treated as third parties vis-à-vis one another (*id.* at 13a).

REASONS FOR GRANTING THE PETITION

This case presents a recurring jurisdictional question that has been resolved inconsistently by the courts of appeals: whether it is proper, under the system of federal court jurisdiction established by Congress, to split a single action seeking both prospective and monetary relief against the United States into two cases – one to be tried in the district courts and the regional courts of appeals, the other to be heard in the Claims Court and the Federal Circuit. Numerous courts of appeals have recognized that such claim splitting is, at a minimum, undesirable, and have not allowed it. In our view, claim splitting is not merely undesirable, it threatens to undermine the very purpose of establishing a single, centralized forum for resolving all money claims against the United States, and is precluded by the jurisdictional scheme enacted by Congress. The federal government and its opposing parties are constantly litigating over this issue, and significant judicial resources are devoted to resolving it. The issue can be expected to plague the lower courts unless this Court provides guidance.[5]

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[5] The decision below on the merits is also important, potentially affecting hundreds of millions of dollars in Medicaid reimbursement throughout the nation. Moreover, the court of appeals' resolution of the merits was seriously flawed. The court substituted its own judgment for that of the Secretary, holding that the organization of any particular state government should not matter for purposes of determining who is and who is not a third-party payor, and that the Secretary must develop some (unspecified) technique to determine, on a case-by-case basis, which services provided by a state's educational agency and labeled "educational" by the state legislature are in fact "medical" as well. This fails to give sufficient weight to the judgment of Congress, which requires that the Medicaid program be administered by a "single State agency" (42 U.S.C. 1396a(a) (5)). It also stands in stark contrast to *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 891-895 (1984), where this Court was required to determine whether a particular service (clean intermittent catheterization),

1. a. This is one of a number of cases decided in recent years in which (1) an action has been brought in district court that includes a claim for more than $10,000 in money damages against the United States; (2) the district court has failed to recognize that such a claim is outside its jurisdiction; (3) the court of appeals has corrected that error on appeal and has either transferred the Tucker Act claim[6] to the Claims Court or dismissed that claim, and (4) the court of appeals has then considered, either implicitly or explicitly, whether the entire case should be heard in the Claims Court or whether, instead, the court of appeals should proceed to the merits. In all of

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already determined to be "educational," was or was not "medical" as well. Relying on a federal regulation that the Court said was entitled to deference, the Court concluded that the fact that the service was performed by a school nurse rather than a physician was sufficient to allow a federal agency to determine that the service was not medical. See also *Utah Dep't of Health*, Decision No. 893 (Departmental Grant Appeals Bd. Aug. 31, 1987), slip op. 9-11, 16-26 (criticizing the First Circuit's decision in this case). Nevertheless, although we view the decision on the merits as erroneous, no other court of appeals has addressed these issues, and therefore no conflict among the courts of appeals has developed. Accordingly, we are not now asking the Court to review this aspect of the judgments below.

[6] In speaking of a "Tucker Act claim" in this petition, we refer to a claim for more than $10,000 against the United States that satisfies the other requirements of 28 U.S.C. 1491, *i.e.*, is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States," and is not a claim "sounding in tort." See also *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1007-1011 (Ct. Cl. 1967) (summarizing limitations on the type of claims that fall under the Tucker Act). When a plaintiff asserts a claim for $10,000 or less against the United States (or waives all Tucker Act recovery in excess of $10,000), such a suit can be heard in district court under 28 U.S.C. 1346(a)(2) – the so-called "Little Tucker Act."

these cases, any prospective relief that the plaintiffs have sought has depended on the same legal theories that underlay their Tucker Act claims. See *Amoco Prod. Co.* v. *Hodel*, 815 F.2d 352, 359-360 (5th Cir. 1987), petition for cert. pending, No. 87-372; *New Mexico* v. *Regan*, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852 (8th Cir. 1983); *Portsmouth Redevelopment & Housing Auth.* v. *Pierce*, 706 F.2d 471 (4th Cir.), cert. denied, 464 U.S. 960 (1983); see also *Warner* v. *Cox*, 487 F.2d 1301 (5th Cir. 1974). The decisions in these cases have not been consistent. In *Portsmouth Redevelopment*, *New Mexico*, and *Amoco*, the courts have transferred the entire case to the Claims Court. In the decision below, and in *Minnesota*, the courts have deemed themselves to have jurisdiction to decide the legal issues presented by the claim for prospective relief—including all issues common to the claim for money damages—even after recognizing that the Claims Court has exclusive jurisdiction over the monetary claim.

At one time, it appeared that the various decisions might be reconciled because each purported to apply some form of "primary purpose" test. This view held that a plaintiff whose primary purpose was to obtain past-due money was required to litigate his case in the Claims Court, but a plaintiff whose primary purpose was to obtain prospective relief could remain in district court in order to litigate the part of the case seeking such relief. See *New Mexico*, 745 F.2d at 1322; *Minnesota*, 718 F.2d at 859; *Portsmouth*, 706 F.2d at 474; see also *Amoco*, 815 F.2d at 362.[7] The decision below, however, explicitly

[7] The courts that have applied the "primary purpose" test provide almost no guidance as to how a court is to ascertain the subjective intent of the plaintiff, if indeed this is possible. They have, for the most part, merely announced their conclusion that the plaintiff's suit either did or did not have as its primary purpose the receipt of past-due money rather than the changing of an ongoing relationship. Compare App. 6a n.1 (views of Judge Breyer) with pp. 13-15, *infra*. The Eighth Circuit's *Minnesota* decision does attempt to provide an operational rule, but it is both arbitrary and probably unworkable. The Eighth Circuit apparently deems the prospective relief to be the primary aim of a lawsuit whenever the relationship stretches far enough into the future that the amount of money that the plaintiff stands to gain prospectively (if the court accepts the claim) exceeds the past disallowance that the plaintiff seeks to recover. See *Minnesota*, 718 F.2d at 859 (footnote omitted) ("The potential current and future [Medicaid] claims foregone dwarf the amount of the disallowance the State seeks to have overturned. * * * The prospective, independent significance of the declaratory relief requested makes it, not the compensatory money payments, the primary relief sought by the State of Minnesota."). This rule is arbitrary, because when a case involves nothing more than a running dispute over who will pay how much money to whom, it would make *jurisdiction* turn on the accident of how long the dispute has already festered (building up a large accrued claim for past damages) or how long it may endure (creating a large claim for prospective relief). Moreover, the test would inevitably present complex questions about whether the future damages should be discounted, and if so at what rate, and there are no clearly discernible standards for judicial resolution of these issues.

rejects the primary purpose test (App. 6a n.1) in favor of a test that requires bifurcation between the Claims Court and the district court in all cases in which the plaintiff invokes the jurisdiction of the district court and seeks both prospective and monetary relief (see p. 8 & note 4, *supra*). The First Circuit's test would have produced results directly contrary to the results that were in fact reached by the Fourth, Fifth, and Tenth Circuits in *Portsmouth Redevelopment*, *Amoco*, and *New Mexico*. The conflict among the circuits, accordingly, has been brought sharply into focus by the decision below.

Portsmouth Redevelopment was a suit to recover certain operating subsidies from the U.S. Department of Housing and Urban Development (HUD). The "annual contributions contract" under which the plaintiff sought to recover those subsidies was an ongoing one (see 706 F.2d at 472-473), and the district court's judgment in favor of the plaintiff would have affected the plaintiff's and

HUD's rights under that contract in the future as well as compelling the payment of $676,085 allegedly due in the past. The Fourth Circuit held that the plaintiff "primarily s[ought] monetary relief" (706 F.2d at 474) and for that reason directed transfer of the entire case to the Claims Court. Under the reasoning of the court of appeals in the present case, however, the "significant prospective effect" (App. 4a) of a ruling on the merits would have required splitting the case into two actions, and would have required the court of appeals to review the district court's judgment on the merits.

Amoco is an action to recover certain royalties paid under protest to the Department of the Interior by the plaintiff pursuant to a gas lease. Because the lease remains in effect (see 815 F.2d at 358), the district court's judgment rejecting the plaintiff's theories has a "significant prospective effect." Indeed, the Fifth Circuit acknowledged "Amoco's concerns about future audits on the * * * lease at issue in this case and about audits on other leases" (*id.* at 367). Yet that court has, without reaching the merits, directed transfer of the entire case to the Claims Court (*id.* at 368), holding that "Amoco seeks, as its 'primary objective' or 'ultimate aim,' * * * the return of some of the money it has paid the government" (*id.* at 362 (citations omitted)). The First Circuit's theory, however, would have required the court of appeals to reach the merits.[8]

[8] Amoco has filed a petition for a writ of certiorari (No. 87-372) in which it argues that the Fifth Circuit should have affirmed the district court's assumption of jurisdiction over the entire case. Amoco never suggested in the Fifth Circuit that the court bifurcate the case into a prospective and a retrospective case and thereby retain jurisdiction to decide the merits, and the questions presented in Amoco's petition for a writ of certiorari do not include the bifurcation issue, although the issue is briefly discussed in the body of the petition. The petition primarily focuses on the interrelationship of the Tucker Act and the Outer Continental Shelf Lands Act. We are responding to Amoco's petition today.

New Mexico was an action seeking to require the federal government to pay the State its statutory share of certain mineral royalties that the federal government had received, and was receiving on an ongoing basis, without first deducting the windfall profit tax. As the Tenth Circuit noted, New Mexico sought "to change in a significant manner the Secretary's methods of calculating the windfall tax and state royalties" (745 F.2d at 1320), a change that would not only require payment of money to New Mexico but also have a "dramatic national impact * * * when considering its future application to all federal lands" (*id.* at 1320 n.2). Nevertheless, the court transferred the entire case to the Claims Court (*id.* at 1323), holding that the action "is a claim for money cognizable under the [Tucker] Act [in which] New Mexico's additional requests * * * are merely incidental and subordinate to the basic suit for money" (*id.* at 1322). There is no doubt, however, that the approach taken in this case would have required the Tenth Circuit to retain jurisdiction over the case, as any judgment would have had, in the words of the First Circuit, a "significant prospective effect."

If *Portsmouth Redevelopment*, *Amoco*, and *New Mexico* were correctly decided, as we think they were (see pp. 17-26, *infra*), it follows that this case was wrongly decided and that the entire action should have been dismissed or transferred to the Claims Court.[9] This conflict among the circuits warrants this Court's attention.

[9] The conflict is not just between the "prospective significance" rationale of the decision below and the "primary purpose" rationale of the other cases, but a conflict in results as well. Even if a "primary purpose" test had been applied in this case, a decision that respondent's "primary purpose" was the obtaining of prospective relief rather than the allegedly past-due money could not fairly be reconciled with the way that the "primary purpose" test was applied to similarly situated litigants in *Portsmouth Redevelopment*, *Amoco*, and *New Mexico*, all of whom (like respondent) wanted their legal theories to be upheld so they could receive future money as well as past-due money.

b. In addition to conflicting with *Portsmouth Redevelopment*, *Amoco*, and *New Mexico*, the decision below conflicts with *Matthews* v. *United States*, 810 F.2d 109, 112 (6th Cir. 1987); *Keller* v. *MSPB*, 679 F.2d 220, 223 (11th Cir. 1982) (per curiam); *Denton* v. *Schlesinger*, 605 F.2d 484 (9th Cir. 1979); *Cook* v. *Arentzen*, 582 F.2d 870, 878 (4th Cir. 1978); and *Carter* v. *Seamans*, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970). In each of those cases, a plaintiff who had lost his or her military or civilian job with the federal government had filed a complaint seeking reinstatement and backpay. In each case, the court recognized that the backpay claim was one cognizable only in the Claims Court (or, before 1982, the Court of Claims, which no longer exists) and declined to allow the plaintiff to pursue his or her reinstatement action separately in district court. Adjudication of the reinstatement action by the district court, these courts held, would "effectively dispose[ ] of all issues concerning [plaintiff's] rights to backpay except the amount * * * [and thus] would substantially infringe on the Claims Court's exclusive jurisdiction over the backpay claim" (*Matthews*, 810 F.2d at 112).[10]

Such cases would certainly be resolved differently under the rationale of the decision below. An individual's claim for reinstatement has a very real and significant prospective effect apart from the payment of money allegedly past due. Indeed, although the reinstatement-and-backpay cases arise in a different context than the decision below, the relevant differences suggest that this is a much weaker case, not a stronger one, for splitting the action between

[10] For decisions that permit some form of claim splitting in the reinstatement-and-backpay context, see *Chabal* v. *Reagan*, 822 F.2d 349, 354 (3d Cir. 1987) (and other Third Circuit cases cited therein); *Shaw* v. *Gwatney*, 795 F.2d 1351, 1356-1357 (8th Cir. 1986) (and other Eighth Circuit cases); and *Smith* v. *United States*, 654 F.2d 50, 52 (Ct. Cl. 1981).

the Claims Court and the district court. In the reinstatement-and-backpay cases, the plaintiff is seeking not only a past and future stream of income, but also the right to hold a particular position or job, which may hold unique value to the plaintiff above and beyond the monetary compensation involved. In this case, in contrast, the only difference between "retrospective" relief and "prospective" relief is that one concerns money allegedly due in the past, and the other concerns money allegedly due in the future.[11] The decision below is therefore in conflict with decisions of the Sixth, Ninth,[12] and Eleventh Circuits, as well as the Fourth, Fifth, and Tenth.

2. All of the foregoing decisions agree that, in the absence of any other waiver of sovereign immunity, the Claims Court has exclusive jurisdiction over Tucker Act claims for money damages in excess of $10,000. The disagreement among the lower courts concerns the scope of the Claims Court's exclusive jurisdiction when the plaintiff combines a Tucker Act claim with a request for some other form of relief. The court of appeals below held that the exclusive jurisdiction of the Claims Court extends *only* to the claim for money damages. In this view, a "mixed" case involving both a claim for past-due money and a claim for prospective relief can be bifurcated, with the district court and the regional court of appeals deciding the claim for prospective relief, and the Claims Court and the Federal Circuit deciding the claim for money damages. Other courts, including the *Portsmouth*

[11] Cf. *Warner* v. *Cox*, 487 F.2d 1301, 1304 (5th Cir. 1974) (in holding that plaintiff's exclusive remedy for alleged nonpayment of money due under an ongoing contract with the federal government was an action under the Tucker Act, the court observed that "[n]one of the substantive claims presented to the court below concerned anything but the payment of money – when, how much, and by whom it should be paid").

[12] But see *Rowe* v. *United States*, 633 F.2d 799 (9th Cir.), cert. denied, 451 U.S. 970 (1980).

Redevelopment, Amoco, and *New Mexico* courts, and the courts deciding the reinstatement-and-backpay cases, have concluded that the Claims Court has exclusive jurisdiction over any case that *includes* a Tucker Act claim. Under this interpretation, claim splitting is prohibited.[13] If the plaintiff asserts only non-Tucker Act claims, or expressly waives any accrued Tucker Act claim, then the district court has exclusive jurisdiction. But if the the complaint, fairly construed, includes a Tucker Act claim for damages against the United States, and there is no other applicable waiver of sovereign immunity that would permit the action to proceed in district court, then the Claims Court has exclusive jurisdiction over the entire action. We respectfully submit that the latter view is the correct one, for three reasons.[14]

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[13] Our discussion in text is, of course, confined to cases in which the claims for prospective relief depend on the same legal theories that underlie the Tucker Act claim for money. Claim splitting is sometimes unavoidable when a Tucker Act plaintiff raises additional issues on the merits that form no part of his Tucker Act case. For example, a plaintiff who seeks relief under both the Tucker Act and the Federal Tort Claims Act must (unless his Tucker Act claim is for $10,000 or less) litigate in both the Claims Court and the district court. Cf. *United States* v. *Hohri*, No. 86-510 (June 1, 1987).

[14] As should be clear from the text, we do not agree with either the "primary purpose" test that some courts have applied or the "significant prospective effect" test applied below. Rather, we submit that there should be a simple rule that forbids claim splitting when, as in this case, all of the legal issues that the district court would resolve (if claim splitting were allowed) are legal issues that the Claims Court would necessarily resolve in adjudicating the money claim. Moreover, our concern primarily is with claim *splitting*, not with the particular choice of a single forum in which the litigation can proceed. Thus, we think there are circumstances in which a plaintiff may forgo or waive his Tucker Act claim and thereby remain in district court. Compare, *e.g.*, *Blassingame* v. *Secretary of Navy*, 811 F.2d 65, 69 (2d Cir. 1987) (allowing judicial review of decision of Board for Correction of Naval Records in district court and regional court of appeals because

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a. Because of sovereign immunity, it is "axiomatic" that the United States may not be sued without its consent. *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). When the United States does give its consent, and "Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). In this case, the court of appeals found that the only applicable waiver of sovereign immunity with respect to respondent's claim for money damages was the Tucker Act. And the Tucker Act, the court acknowledged, provides that such suits must be brought in the Claims Court. Accordingly, the court held that the Claims Court had exclusive jurisdiction over at least part of respondent's action—the claim for money damages.

As the court of appeals further acknowledged, the district court would have jurisdiction to hear the other part of respondent's action—the claim for prospective relief—only if there were some independent waiver of sovereign immunity applicable to such claims other than the Tucker Act. The court of appeals identified the Administrative Procedure Act (APA) as the other applicable waiver of sovereign immunity in this case (App. 4a).

Blassingame has expressly relinquished any claim for monetary relief"), with *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983) (noting general availability of judicial review of such decisions in the Claims Court). What a plaintiff in such a case should not be allowed to do—because he could have litigated his case in the Claims Court to begin with—is to use a favorable judgment obtained in the district court (by forgoing his Tucker Act claim) in order to seek a subsequent monetary judgment in the Claims Court on the basis of collateral estoppel. See 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.405[3], at 192 n.2 (2d ed. 1984) ("The principle that a plaintiff may not assert grounds for recovery that he could have asserted in a prior suit resolved by final judgment derives from the rule against splitting a single cause of action."); see also *id.* ¶ 0.410[1]; cf. *Boruski* v. *United States*, 493 F.2d 301 (2d Cir.), cert. denied, 419 U.S. 809 (1974).

Specifically, the court cited 5 U.S.C. (Supp. IV) 702, which provides that "[a]n action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party" (emphasis added).

However, the waiver of sovereign immunity in the APA, which of course must be strictly construed,[15] can extend no further than the cause of action created by that statute. Section 10(c) of the APA, 5 U.S.C. 704, provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." This section sets forth two possible causes of action: statutory review ("agency action made reviewable by statute") and nonstatutory or APA review ("final agency action for which there is no other adequate remedy in a court"). In this case, it is undisputed that there is no applicable statutory review provision. As respondent stated in its complaint: "No special statutory form of proceeding is provided for review of the decision of the Board" (App. 90a, 96a). Therefore, respondent was entitled to review under the APA only if it was challenging "final agency action for which there is *no other adequate remedy* in a court" (5 U.S.C. 704 (emphasis added)).

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[15] See, *e.g.*, *Block* v. *North Dakota*, *supra*; *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941) ("The section must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted."); see also *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 7 ("we must construe waivers strictly in favor of the sovereign").

Here, respondent had no cause of action under the APA, because it had an adequate legal remedy in the Claims Court under the Tucker Act. Courts have often recognized that resolution of a Tucker Act suit in the Claims Court *can* be an "adequate remedy" that precludes APA review,[16] and such an action would clearly be fully adequate in the circumstances of this case (and in such similar cases as *Amoco*, *New Mexico*, *Minnesota*, and *Portsmouth Redevelopment*). First, this is simply a dispute about a stream of money payments over time. In such a case, final resolution of the legal dispute by the Claims Court would accomplish all of the plaintiff's litigation objectives: if the plaintiff prevails, it gets back all of the past-due money to which it is entitled, and it obtains a statement of the law that will bind the federal government in its future dealings with the plaintiff. See generally *Amoco*, 815 F.2d at 367; *Cook* v. *Arentzen*, 582 F.2d at 878 n.6. Second, although the Claims Court generally lacks the power to grant declaratory and injunctive relief as such, Congress has explicitly given it the power "to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just" (28 U.S.C. 1491(a)(2)). Thus, in any case (such as this one) involving review of agency action there

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[16] *American Science & Eng'g, Inc.* v. *Califano*, 571 F.2d 58, 62-63 & n.6 (1st Cir. 1978); *Alabama Rural Fire Ins. Co.* v. *Naylor*, 530 F.2d 1221, 1230 (5th Cir. 1976); *International Eng'g Co.* v. *Richardson*, 512 F.2d 573, 580-581 (D.C. Cir. 1975), cert. denied, 428 U.S. 1048 (1976); *Warner* v. *Cox*, 487 F.2d at 1304, 1306. Results similar to the results in these cases have been reached, without relying on 5 U.S.C. 704, in *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986), and *North Side Lumber Co.* v. *Block*, 753 F.2d 1482, 1485 (9th Cir.), cert. denied, 474 U.S. 931 (1985). In those cases, the courts have treated the Tucker Act as a statute that "impliedly forbids" an APA action within the meaning of 5 U.S.C. (Supp. IV) 702, rather than a statute that provides an "adequate remedy" within the meaning of 5 U.S.C. 704.

is little basis for any fear that a plaintiff forced to litigate its entire case in the Claims Court will ever receive less than adequate relief.

In short, under the Tucker Act respondent could have brought its action in the Claims Court. Because this action was "an adequate remedy in court," respondent had no cause of action under the APA. Because respondent had no APA action, the only applicable waiver of sovereign immunity was that provided by the Tucker Act. The Claims Court therefore had exclusive jurisdiction over the entire controversy.

b. In the Tucker Act, Congress has decreed that the Claims Court shall have exclusive jurisdiction of claims in excess of $10,000 against the United States. Compare 28 U.S.C. 1346(a)(2) (district court and Claims Court have concurrent jurisdiction over claims under $10,000), with 28 U.S.C. 1491(a) (Claims Court has jurisdiction over claims in excess of $10,000). The purpose of the Act clearly was to centralize all large monetary claims against the United States in a single court. See *United States* v. *Hohri*, No. 86-510 (June 1, 1987), slip op. 7 (recognizing that purpose of Tucker Act is to ensure uniformity of results in nontort actions involving more than $10,000). The claim splitting sanctioned by the court of appeals threatens to undermine this legislative objective. As the court of appeals construed the Tucker Act, any time a plaintiff appends a claim for prospective relief to a Tucker Act claim for monetary damages, the case must be bifurcated, with the district courts and the regional courts of appeals resolving any and all legal issues common to both claims for relief. This resolution of all common legal issues is then binding on the Claims Court by operation of collateral estoppel.[17] Rather than preserving the role of the

[17] The court's assumption about collateral estoppel (App. 6a-7a) was directly contrary to the usual rules of preclusion, which forbid claim splitting (see note 14, *supra*). If respondent had brought only its prospective claims in district court, ordinary principles of res judicata would have precluded respondent from maintaining a separate action for money damages at all, let alone maintaining an action in which the government would be collaterally estopped from contesting liability. Here, of course, it is the court of appeals, not respondent, that has split the claims.

Claims Court as the single tribunal charged with the uniform resolution of all legal issues presented in such cases, this construction promises to disperse legal actions against the United States for money across every district court in the land and twelve different regional judicial circuits. As the *Amoco* court put it, "asking for 'more' relief where monetary relief will satisfy the claimant's needs cannot defeat the jurisdictional scheme set up by Congress—to centralize money claims against the government, except those claims under $10,000 and those sounding in tort, in the Claims Court" (815 F.2d at 367; accord *Portsmouth Redevelopment*, 706 F.2d at 474).[18]

Indeed, the judgment below, by allowing the jurisdiction of the Claims Court to be defeated by artful pleading in any case involving an ongoing or potentially repetitious

[18] Ironically, under the approach taken by the court of appeals, a plaintiff who improperly brings a Tucker Act claim for more than $10,000 in district court may obtain an adjudication of the merits of his claim, so long as he also requests (or is deemed to have requested) "prospective" relief. But a plaintiff who properly brings a Little Tucker Act action in district court must pursue or defend any appeal in the United States Court of Appeals for the Federal Circuit, whether or not he also requests prospective relief. Under 28 U.S.C. 1295(a)(2), the Federal Circuit has exclusive jurisdiction over any final decision of a district court "if the jurisdiction of that court was based, *in whole or in part*," on the Little Tucker Act (emphasis added). Cf. *United States* v. *Hohri*, No. 86-510 (June 1, 1987). It is exceedingly difficult to believe that Congress, whose very strong desire to centralize the adjudication of Tucker Act claims has been recognized by this Court (*Hohri*, slip op. 6-8 & n.4), intended that this purpose could be so easily bypassed in Big Tucker Act cases through the device of claim splitting.

dispute, threatens to reduce the Claims Court to the role of a mere paymaster. This Court has previously rejected attempts to defeat the sovereign immunity of the United States by the subterfuge that a " 'judicial ascertainment' of credits" is somehow different from a "judgment" against the United States. *United States* v. *Shaw*, 309 U.S. 495, 504 (1940). It should do so here as well, by construing the Tucker Act to mean that the exclusive jurisdiction of the Claims Court extends to any case that *includes* a Tucker Act claim for money damages against the United States.

c. Claim splitting not only undermines the central role of the Claims Court, it generates delay, duplication of effort, confusion, and conflict. Under the rationale of the court of appeals, if the plaintiff proceeds in the district court and prevails, then a second action must be brought in the Claims Court. As a result, every lawsuit against the United States that involves claims to both prospective and retrospective relief has the potential of multiplying into two lawsuits. This inevitably creates additional delay and waste of resources, both judicial and otherwise.[19] Furthermore, if the district courts and/or regional court of appeals decide all common issues in the case, and if collateral estoppel is applied in the way the court of appeals assumed it would be, additional problems would arise in applying those general legal principles to specific claims for

[19] For example, see *Smith* v. *United States*, 654 F.2d 50 (Ct. Cl. 1981) (refusing to accept district court's transfer of backpay portion of reinstatement-and-backpay case); *Hondros* v. *Civil Serv. Comm'n*, 720 F.2d 278 (3d Cir. 1983) (resolving merits of same case in reinstatement context); *id.* at 299 n.40 (views of Chief Judge Seitz) (disagreeing with decision of Court of Claims not to accept jurisdiction); *id.* at 302-303 (Adams, J., concurring) (agreeing with decision of Court of Claims not to accept jurisdiction); *Smith* v. *United States*, 823 F.2d 532 (Fed. Cir. 1987) (14 years after events in question, and at least 11 years after litigation began, finally resolving the merits of plaintiff's backpay claim for his removal from position as a deputy marshal).

monetary relief. In contrast to the usual situation in which a court of appeals decides controlling legal issues and remands to a lower court, which is subject to its review and supervision, here the application of general principles to specific facts is entrusted to the Claims Court, which is subject to review only by the Federal Circuit. Thus the claim-splitting solution endorsed by the First Circuit would create not only delay and duplication of effort, but also a serious potential for intercircuit friction and conflict.

Finally, the court of appeals' judgment gives rise to new opportunities for forum shopping. Under the First Circuit's construction of the Tucker Act, plaintiffs who have Tucker Act claims have the option, in all but the rare case in which the lawsuit focuses exclusively on past, nonrecurring events, of obtaining an adjudication on the merits in either the Claims Court and the Federal Circuit, or a district court and its regional circuit. Thus, if a plaintiff thinks a particular district court or regional court of appeals will be more sympathetic to his claim than the Claims Court, he can file an action for a declaratory judgment in district court, and if successful, use collateral estoppel to convert a favorable judgment into a collection action in the Claims Court. Cf. *Green* v. *Mansour*, 474 U.S. 64, 73 (1985) (condemning similar attempt to obtain money judgment in state court by first obtaining declaratory judgment in federal court, given state's immunity from award of money damages directly by federal court). Conversely, if a plaintiff thinks the Claims Court will be more sympathetic than a district court, he can go first to the Claims Court, and have the central legal issues resolved there. We submit that no legitimate interest of any party or of the judicial system requires such a result. Every legal issue that is decided by the district court and regional court of appeals under the First Circuit's claim-splitting scheme is one that would necessarily be decided

by the Claims Court if the entire litigation were allowed to proceed there.[20]

The APA's waiver of sovereign immunity may be a broad and general one, but it is not without its limits. Certainly it does not compel claim splitting, nor does it permit the kind of end run around the Tucker Act that has been made in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[20] There is absolutely no indication that Congress ever intended to permit claim splitting. Indeed, the Judicial Code strongly suggests that Congress regarded it as undesirable. See 28 U.S.C. 1500 ("The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who * * * [was] acting or professing to act * * * under the authority of the United States."). The courts that have permitted claim splitting seem to regard it as a curious side effect of the interaction of the Administrative Procedure Act and the Tucker Act (see App. 5a-6a), not as a procedure that Congress ever considered and intended.

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